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We all stand together: The role of the Association of Asian Constitutional Courts and equivalent institutions in promoting constitutionalism

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WE ALL STAND TOGETHER – THE ROLE OF THE ASSOCIATION OF ASIAN CONSTITUTIONAL COURTS AND EQUIVALENT INSTITUTIONS IN PROMOTING CONSTITUTIONALISM

Abstract

This article critically evaluates the interplay among courts with constitutional jurisdiction in Asia. This is done in the specific context of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). It finds that the AACC has to-date made only a nominal contribution to cultivating inter-court relations in furtherance of common goals and advances the claim that its members ought to rectify this state of affairs. On the one hand, transnational judicial alliances have instrumental value for participating courts in the discharge of their mandate. On the other hand, the AACC can be a useful conduit in nurturing an Asian perspective to the global judicial discourse on constitutional issues. In that vein, the article identifies the most suitable means to enable the AACC to optimally discharge its role to help advance respect for democracy, the rule of law, and human rights in the region.

Keywords

Association of Asian Constitutional Courts and Equivalent Institutions (AACC); transnational judicial engagements; constitutional justice; constitutionalism; means of communication

Introduction

Countries increasingly conceive of judges as the favoured bulwark to ultimately protect constitutional rules and values. Indeed, looking at the contemporary legal landscape in Asia, one finds specialized constitutional courts from Seoul to Jakarta to Nay Pyi Taw City. To be sure, the rise of constitutional adjudication is not unique to this region.[1] "Constitutional review, the power of courts to strike down incompatible legislation and administrative action", observed Ginsburg in 2008, "has become a norm of democratic constitution-writing".[2] He went on to mention that in that year, 158 out of 191 constitutional systems explicitly empowered one or more judicial

[1] See e.g., Ginsburg (2008a); Ginsburg & Versteeg (2014); Stone Sweet (2000); Tate & Vallinder (1995); Shapiro (1999); Brewer-Carías (1989). Focusing on Europe, see e.g., de Visser (2014), ch. 2 (2014); Sadurski (2011); Schwarz (2000); Cappelletti (1970); discussing Latin America, see e.g., Helmke & Rios-Figueroa (2011); Frosini & Pegoraro (2008); Schor (2009); Brewer-Carías (2014) (examining the availability of recourse to courts with constitutional jurisdiction for individuals in the event of alleged breaches of their fundamental rights); and as regards Africa, see, e.g., Choudhry et al (2014); Klug (2008); Örücü (2008).

[2] Ginsburg 2008a, *supra* note 1, p. 81.

bodies to guarantee respect for their country's constitution. Hirschl qualifies the global trend towards what he calls a juristocracy as "arguably one of the most significant developments in late-twentieth and early-twenty-first-century government."[3] Befitting of a phenomenon of such importance, academic attention has been lavished on the ascent of constitutional adjudication, and recent years have seen a steadily growing corpus of book-length treatises and journal articles that chronicle the birth and adolescent development of Asian constitutional courts.[4] These studies have mainly sought to examine the relationship between such specialised judicial bodies and other institutional players on the domestic scene. Scholars have until now largely disregarded the interplay among Asian constitutional courts in different jurisdictions.[5] This is regrettable, as it prevents students of these institutions from obtaining a holistic view of the latter's environment and the vectors that may have an impact on their functioning.

In an era of globalisation where cross-border exchanges with like-minded people, businesses and institutions is rapidly becoming 'the new normal', judges and courts with a constitutional mandate too interact with their counterparts in other States. Two modes of contact may be distinguished in this regard. Judges may have occasion to communicate with each other in real-time; additionally or alternatively, they can engage[6] with foreign decisions by referencing these in their rulings.[7] The focus here is on the first of these processes,[8] while acknowledging that the direct and indirect modes of interaction are not hermetically separate: the choice as to the citation of a particular foreign case or court may be precipitated by face-to-face meetings with the members from that judicial institution and vice versa, using foreign decisions in domestic adjudication may motivate judges to orchestrate personal encounters with the authors of those judgments.

[3] Hirschl (2004), p. 1
[4] See, e.g., Harding & Leyland (2008); Harding (2010); Ginsburg (2010); Hendrianto (2010); Ginsburg (2003).
[5] But see Saunders (2014a); Law (2015); Law & Chang (2011) (examining the pattern of foreign cross-citations by the Taiwanese court).
[6] This is the term profitably used by Jackson (2013) to describe one of a range of postures vis-à-vis the transnational legal environment.
[7] There is a semantic discussion whether foreign citations can be referred to as 'communication' or as involving a 'judicial dialogue', since courts may decide to reference foreign decisions for a variety of reasons that are not necessarily geared towards establishing or maintaining a conversation with foreign judges. See e.g. Law & Chang (n 5), p. 528-34; Voeten (2010).
[8] There is an abundant literature on foreign cross-citations. See specifically in relation to courts with constitutional jurisdiction e.g. Groppi & Ponthoreau (2014); Hirschl (2014), ch. 1; Scalia & Breyer (2005); Halmai (2012); Saunders (2011); Foster (2010); Bryde (2006).

This article explores one particular avenue for direct interaction: the setting up of or joining plurilateral associations of judicial institutions. In the past decade, such groupings have become a common sight in almost all regions of the world.[9] The article takes as its starting-point the Asian version, which has as its nomenclature the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). It is not the aim of this article to build a case for or against the legitimacy of institutionalised networking among judges in a regional setting. Nor does it seek to conceptualise or theorise the inter-court relationships that may develop in the wake of its establishment. Rather, the purpose of this article is explain why (Asian) judges are drawn to participate in a regional alliance and examine the potential that such a grouping may have in working towards the realisation of common goals. It unfolds as follows. Part I introduces the AACC's current composition and identifies the impetus for courts with constitutional jurisdiction to organize themselves into an institutionalised community. Structured and repeated interactions with their counterparts are considered instrumentally and intrinsically useful in the discharge of their mandate, and the AACC is accordingly conceived as an important means to advance constitutionalism in the region. Part II explores the workings of the AACC. In spite of its function as a network, the Association has to-date made only nominal progress in the delivery of its admittedly ambitious objectives. This is doubly disappointing, because members and other courts in the region are deprived of the full benefits that transnational judicial alliances may bring and the wider community is divested from receiving a concerted Asian contribution to the global discourse on constitutionalism and the delivery of constitutional justice. Part III accordingly identifies the changes that should be implemented to enable the AACC to begin to optimally discharge its role in fostering a true sense of partnership among Asian constitutional judiciaries, and thereby help promote democracy, the rule of law, and human rights in the region and beyond.

I. Understanding The Establishment Of The AACC

[9] Europe has been the forerunner: the Conference of European Constitutional Courts was established in 1972. In 1997, the Union of Arab Constitutional Courts and Councils saw the light of day, followed in 2003 by the Southern African Chief Justice Forum and the launch of the launch of the Latin American Conference of Constitutional Justice in 2005. In 2011, the Conference of Constitutional Jurisdictions of Africa was established and earlier this year, the region also witnessed the founding of the Network of Constitutional Courts and Councils of West- and Central Africa.

1. Genesis And Composition

Taiwan was the first Asian country to grant the power to enforce the constitution to a judicial organ: the 1947 Republic of China constitution gave authority to interpret this text to the Council of Grand Justices.[10] A lack of clarity as to the functioning of a system of judicially-operated constitutionality control,[11] seriously compounded by almost four decades of martial law, however meant that the Taiwanese Council of Grand Justices could only begin to discharge its responsibilities in earnest from the late 1990s onwards. Taiwan was not alone in its efforts to dismantle authoritarian rule: in the wake of the end of the Cold War, other jurisdictions in eastern, south-eastern and central Asia too set out to democratize and embarked upon political reform, with several of these similarly deciding to vest courts with the competence to uphold the commitment to constitutionalism.[12] While judicial institutions are thus conceived as important cogs in the new constitutional machinery, their position is somewhat precarious, in that their *raison d'être* means that they are called upon to pronounce on the constitutional permissibility of actions taken by the political branches of government. One can readily understand that legislatures and executives may not always be able to accept with equanimity judgments striking down rules and policies adopted on grounds of political expediency for want of constitutional propriety. Against this reality, forging ties with their counterparts in other jurisdictions is seen as valuable in providing courts with a constitutional mandate moral support and intellectual resources in enforcing constitutional rules and values, as will be elaborated further below. Indeed, there has been a progressive intensification of cross-border judicial contact in Asia from the start of the new millennium onwards. The Indonesian and in particular the Korean constitutional court have played key roles in this regard. The former hosted a seminar in 2003 that for the first time brought together constitutional justices from across the region for the purpose of discussing the present status and future development of constitutional adjudication in Asia. This event was followed by similar gatherings in the next two years, and during the 2005 meeting, participants began exploratory talks on the need

[10] See Law Governing the Council of Grand Justices of the Judicial Yuan, July 21 1958, art. 3 (Taiwan).
[11] See Fa (1991).
[12] See South Korea's Constitution, art. 111; Mongolia's Constitution, arts. 64 and 66; Tajikistan's Constitution, art. 89; Kazakhstan's Constitution, art. 72; Indonesia's Constitution, art. 24c.

for a greater degree of institutionalisation to facilitate their cooperation and exchange of experiences. The outcome was a 2007 Memorandum of Understanding between the courts of Indonesia, Korea, Mongolia and the Philippines which provided for the establishment of a preparatory committee to do the groundwork for the eventual setting up of an association of constitutional judiciaries. Over the course of the period 2008-2010, the committee duly prepared a draft Statute, while judges continued to meet and share views on an annual basis. The Association of Asian Constitutional Courts and Equivalent Institutions was officially established in Jakarta in 2010, with courts from Indonesia, Malaysia, Mongolia, the Philippines, Thailand, Uzbekistan and Korea as founding members. By 2015, the number of participating judiciaries had doubled, with the AACC having accepted membership applications from the constitutional courts of Azerbaijan, Kazakhstan, the Russian Federation, Tajikistan and Turkey; the Pakistani Supreme Court and the Independent Commission for Overseeing the Implementation of the Constitution of Afghanistan. The exponential growth of the Association's membership from seven to 14 evinces that participation in a transnational judicial network is an attractive prospect for many of the region's constitutional judiciaries. Before turning to the forces that account for this phenomenon, the AACC's composition warrants some brief observations.

Membership of the Association is declared to be open to judicial institutions that exercise constitutional jurisdiction. The Statute does not elaborate the precise meaning to be ascribed to this notion, but it must be taken to encompass at the very minimum the ability to assess the constitutional permissibility of parliamentary legislation. While it is common for constitutional courts and equivalent entities to also carry out other functions – for instance, resolving institutional disputes among State organs or different echelons of government or ensuring the integrity of political office – a normative account of constitutional adjudication emphasizes that the core aim pursued by this activity is making sure that the legislative branch does not overstep the constitutional limits of its powers.[13] The AACC carries out a minimal vetting exercise in this respect: it requires that the file for membership applications includes "[i]nsofar as possible" the documents that set out the scope and nature of the

[13] Cf. e.g., Ginsburg & Elkins (2008b), p. 1431, who refer to this as a "paradigmatic power" of courts with constitutional jurisdiction; Ferreres Comella (2009), p. 6-7, using the term "purity" to describe courts whose docket mainly consists of review of legislation in light of the constitution.

applicant's jurisdiction,[14] but does not demand the actual performance of this task. The current set of eligibility criteria could profitably be expanded to include the submission of evidence – which will typically take the form of judgments handed down – that the court in question has in fact been called upon to protect constitutional provisions and principles from incursions by the legislature. A check along these lines would not appear to be too burdensome in terms of resources or too difficult to surmount as a matter of practice for either the candidate court or existing members, while providing a confirmation of enduring homogeneity among AACC judiciaries as regards one of their core characteristics. Such a signalling function is useful because "sameness" as regards identity, social function and performance is vital for building trust and fostering mutual respect, and the meaningful sharing of ideas and experiences in line with the aims professed by the Association, as detailed below, must be undergirded by these attributes.[15]

The AACC is agnostic when it comes to the institutional arrangements governing the exercise of constitutional jurisdiction. Membership is not restricted to purposely-designed constitutional courts located outside the regular court system; as its nomenclature makes clear, "equivalent institutions" are also welcome to join the Association, and several have indeed done so. The explicit mention of this second category may be explained with reference to the reality of the models of constitutional adjudication found in Asia.[16] A number of countries distribute powers of constitutional review widely to many or even all regular courts rather than concentrate the exercise of constitutional jurisdiction in a single court. This system of decentralisation is notably popular in countries that belong to the common law family, whereas civil law jurisdictions tend to prefer the establishment of separate constitutional courts.[17] One of the enduring vestiges of colonial rule is the ubiquitous presence of common law systems in the region, attributable to the once-indomitable

[14] Association of Asian Constitutional Courts and Equivalent Institutions Statute [AACC St.], art. 7(2)(c.)

[15] In a related vein, the AACC may want to amend its Statute by introducing a provision regulating loss of membership, including in situations where its board considers that a member court can no longer be taken to exercise constitutional jurisdiction or has fatally compromised its duty to act as a constitutional guardian, cf. the approach adopted by other alliances (see e.g. Conference of European Constitutional Courts Statute, art. 7(2)).

[16] Indeed, the AACC is unique among regional associations of constitutional courts and councils in including a reference to "equivalent institutions" in its name.

[17] On the relevance of the difference between the civil or common law nature of a legal system, with an emphasis on the contrast between the US and Europe, see Rosenfeld (2004), p. 635-8 and see also Hahm (2012), discussing how the South Korean constitutional courts fits within these paradigms.

force of Great Britain. The Association has clearly sought to cater to the prevailing variations in institutional design and its members accordingly exhibit a greater degree of institutional diversity than do similar groupings in for instance Europe and Latin America, where separate constitutional courts dominate the legal landscape.[18]

Not only must a candidate court possess the formal competence to perform constitutional review, it must be able to do so in "sovereign country in Asia".[19] This condition should be seen as a reflection of the region's preoccupation with a defensive understanding of the concept of sovereignty, as also evident in the context of other regional cooperative endeavours such as ASEAN, which takes the principle of non-interference in the domestic affairs of member states as one of its guiding norms.[20] For the AACC, it means for instance that the Hong Kong Court of Final Appeal – which undeniably exercises constitutional jurisdiction[21] – is prevented from acceding in respect of the SAR of Hong Kong territory. It could also spell difficulties for the region's oldest constitutional court, the Taiwanese Council of Grand Justices, given China's concerted attempts to thwart general recognition of Taiwan by the international community. The Taiwanese court has not been asked to join the Association outright, but rather invited to submit a membership application – suggesting that admittance might not be a mere formality. Its justices have so far refrained from pursuing membership, as several of them perceive a risk of being asked to leave the Association in the eventuality that China's supreme people's court were to join as well.[22]

A further point of note concerns the wide geographic remit of the AACC: each of the subregions recognised by the UN statistical division for Asia is represented by at least one judicial institution.[23] The Association may be commended for its apparent desire to establish itself as a truly pan-Asian organisation – again markedly different

[18] 18 of the EU's 28 member states have set up such institutions. In Latin America, Kelsenian constitutional courts can be found in Bolivia, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala and Peru.
[19] AACC St., art. 6(1).
[20] Cf. the 2007 ASEAN Charter, art. 2(e); ASEAN's 1976 Treaty of Amity and Cooperation in Southeast Asia, art. 2, on which e.g. Seah (2012), discussing how Australia and the US have sought to influence the meaning of the prohibition against non-forcible intervention. See also the 1985 Charter of the South Asian Association for Regional Cooperation (SAARC), Art. 1. For discussion of the impact of this principle
[21] See Hong Kong Basic Law, July 1, 1997, art. 158 and the speech of Li, Andrew CJ in *Ng Ka Ling v Director of Immigration* [1991] 1 HKLRD 315 (Court of Final Appeal, Hong Kong), on which e.g. the various contributions in Chan, Fu & Ghai (2000).
[22] Law, *supra* note 5, p. 983.
[23] UNStats.un.org (2013).

from other cross-border collaborative endeavours in the region that are decidedly more modest in this regard. Yet, this inclusive approach exacerbates the heterogeneity among the AACC's members: there are marked variations in political regime and climate, socio-economic stature and state-religion relationships among and within Asia's subregions. The upshot is that each of the participating and possible future members of the Association carries out its functions in an environment that is quite dissimilar from that in with its foreign counterparts exercise constitutional jurisdiction. Although Asian courts acting in constitutional mode can be said to belong to the same transnational space and experience some form of intrinsic connection as a result of their official role, there are thus few other shared characteristics that would otherwise contribute to smooth inter-court relationships or induce non-members to consider joining the Association. On that note, there are courts that one might be disappointed not to find on the AACC's current list of members. Leaving aside Taiwan, these include judicial institutions from Cambodia, Singapore, and Japan. While some Japanese judges claimed not to be aware of the Association's existence,[24] justices from Cambodia and Singapore have attended meetings of constitutional courts in the region and their absence must thus be seen as a deliberate choice. In the case of the Singapore Supreme Court, the likely reason is that its justices are more invested in pursuing transnational relationships in the commercial domain than expend their resources on fostering cross-border links regarding constitutional matters,[25] also given the relative infrequency with which they are called upon to exercise its powers of constitutional review.[26] While the Cambodian constitutional council is interested in engaging with its foreign counterparts, it does not seem to consider the AACC the best conduit for doing so and has instead joined the Association of Constitutional Courts using the French

[24] Recounted in Law, *supra* note 5, p. 975.

[25] Evidenced for instance in the establishment of the Singapore International Commercial Court in early 2015, which includes a number of foreign judges from various jurisdictions and legal traditions on its bench and the keynote address by Chief Justice Menon (2013).

[26] Although the Singapore constitution is silent on the matter, the Singapore judiciary has accepted that it is competent to verify the constitutionality of legislative and executive acts, cf. *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209, para 9; *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 410 at para. 89; *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189, para. 31. In *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209 the court further declared that the Singapore constitution should "primarily be interpreted within its own four walls". More generally, there has been since the 1980s a powerful drive in favour of developing a "more autochtonous" legal system in Singapore, although there have been references to foreign cases in constitutional judgments that do at the same time suggest a potential to engage in foreign jurisprudence. For further discussion see e.g. Thio (2006).

Language.[27] The AACC for its part is keen to expand its membership. In a declaration adopted on the occasion of its inaugural congress, it explicitly called upon "more Asian institutions exercising constitutional jurisdiction to join the AACC".[28] Whether this overture will elicit the desired response is largely dependent on two factors: the perceived attraction of, or even need for, engaging with other courts through participation in a transnational alliance; and once the case in favour of doing so has been made, the comparative allure of the AACC as the judicial network that one ought to join. The next section explores the first of these factors; the second is discussed in Part II below.

B. The Turn To Transnational Judicial Associations

There is arguably nothing new about the phenomenon of judges of various countries meeting one another or taking cognisance, in whatever form, of each other's decisions.[29] As such, the exponential increase in the ease with which one can travel internationally and the advent of the internet as a global dynamic assembly of information would simply mean that judges have more opportunities than before to engage with foreign justices. Yet, while occasional get-togethers at international conferences or bilateral visits retain their appeal, the last years have seen the mushrooming of plurilateral judicial networks that span national borders. This phenomenon signals that there is an apparent need for more stable, structured frameworks that allow for repeated interactions and the deepening of inter-court relationships. It is possible to distinguish three reasons that motivate courts to set up or participate in transnational judicial alliances such as the AACC.[30] The particular impetus felt by judges in this regard in turn shapes the strategic objectives that such associations are expected to deliver.

A first reason is ideological and emphasises the universality of certain constitutional ambitions. As a judge of the Korean constitutional court has put it:

[27] ACCPUF.org (2015).
[28] AACC (2012), para. 4. This entreaty was repeated in AACC (2014), para. 3 ("[W]e invite sincerely the other constitutional and supreme courts in Asia to stand with us shoulder to shoulder in the AACC for protection of human rights, democracy and the rule of law").
[29] See e.g., Baudenbacher (2003); Goldman (2007).
[30] These reasons may, but need not, overlap with those that motivate courts to use foreign law in the course of constitutional adjudication. For a discussion of the factors that may animate the practice of cross-citation see e.g. McCrudden (2000), p. 516-27.

"[t]he constitutions of today's democratic countries share common purposes: to guarantee all citizens their human worth and dignity and freedom and to serve justice and peace".[31] A similar line of reasoning is reflected in the AACC's Statute, which proclaims that the Association seeks to promote "the protection of human rights; the guarantee of democracy; the implementation of the rule of law".[32] The underlying thinking is that the realisation of this holy trinity of constitutionalism is not unique to any specific country, but to be pursued across the region (and beyond). In countries where the courts have been endowed with constitutional jurisdiction, judges have the principal (though not exclusive[33]) responsibility for upholding constitutional norms that give expression to democracy, rights and the rule of law. When judges subscribe to the idea that their national constitutions encompass universal objectives or principles,[34] they are more likely to conceive of foreign judges as partners in a joint enterprise of upholding such shared constitutional values and hence look for ways to engage with each other. Transnational judicial groupings such as the AACC are attractive because, different from *ad hoc* participation in academic conferences or bilateral judicial delegations from one court to another, they hold out the promise of repeated and structured opportunities for judges to talk about their work in implementing universal constitutional principles in their local context. At the same time, the claim made on the judicial association or other member-courts is limited under this rationale: they help to satiate a desire for kinship and common purpose that courts with constitutional jurisdiction do not find with political institutions on the domestic plane. Depending on the local context, a participating court may further derive intangible benefits from joining, notably moral support and authority. It is in the nature of a constitutional court's work to deliver rulings that are not welcomed by all of their domestic audiences;[35] and most judges are keenly aware of the importance of retaining sufficient socio-political capital to ensure that their decisions are heeded in the majority of cases and that their institutional legitimacy is not placed in jeopardy. This could engender a response of pandering to public or political pressure,

[31] Min (2012), p. 8.
[32] AACC St. art 3 (a) to (c).
[33] See e.g. de Visser, *supra* note 1, ch. 2; Tushnet (2003); Simson Caird (2012); Hiebert (2005); MacDonnell (2015).
[34] The belief in moral standards that transcend any specific community is often associated with the concept of natural law.
[35] These will include the legislature, the executive, academia, (groups within) society and the media. For wider discussion of the range of national audiences for a court, see e.g. Garoupa & Ginsburg (2009); Bloom (2008).

given the immediacy of a possible backlash, at the expense of eroding constitutional principles over the long run. The appeal of judicial behaviour along these lines will likely be strongest when constitutional justice is not yet firmly established and powerful vestiges of the old political settlement remain in place or in the face of serious threats to fundamental constitutional precepts in the name of policy measure that enjoy considerable public support (think for instance of overbroad counter-terrorism legislation).[36] An important characteristic of regional and global judicial partnerships is a sense of transnational solidarity. For courts with constitutional jurisdiction, the knowledge that they "not alone" in facing public or political pressure, but belong to a community of like-minded institutions, some of which may have weathered comparable storms, may give them additional moral courage to remain faithful to constitutional values even in challenging situations.

A second reason that accounts for the willingness to join transnational judicial groupings is more pragmatic and focuses on the contribution that such groupings can make to the successful performance of constitutional adjudicatory functions. Different from the first rationale, membership is expected to yield more tangible benefits in the form of access to accumulated knowledge, wisdom and expertise that participants may find useful in enhancing their performance. Organisations such as the AACC are looked to as resource facilities and information depositories for constitutional justice. This line of thinking tends to resonate strongly with courts that are in their infancy or early adolescence, as their need for a sounding board or role models is typically greater than for more mature and established courts.[37] The explanatory force of this motivation for the turn to transnational judicial associations is particularly strong: leaving aside the European Conference of Constitutional Courts, which was founded almost two decades before the "landslide victory of constitutional justice"[38] in that part of the world, the establishment of similar organisations followed on the heels of the advent of constitutional adjudication in the relevant region. It is therefore unsurprising that the AACC Statute duly acknowledges this impetus for membership in its preamble, where mention is made of the "need of sharing experiences, exchanging information, and discussing issues of mutual concern over constitutional

[36] See e.g. Fabbrini & Jackson (2015); Davis, McGarrity & Williams (2014); Cole, Fabbrini & Vedaschl (2013).
[37] See also Goldsworthy (2012), p. 709, who argues that the unavailability of local precedents for new courts has explanatory value when it comes to the frequency with which foreign judgments are cited.
[38] Holzinger (2014).

practice and jurisprudence *for the development of the Asian constitutional courts and equivalent institutions*" (emphasis added).[39] This development covers various aspects. Whether driven by professional pride or a principled commitment to uphold constitutional values to their maximum extent, judges will normally seek to administer constitutional justice to the best of their ability. By pooling information and ideas from various jurisdictions, transnational judicial associations are able to provide their members with the opportunity to acquire intellectual assets that can enhance the quality of constitutional decisions.[40] Learning about different approaches to the constitutional questions that come before them may sharpen judges' minds and broaden their horizons.[41] As such, there may, but need not, be a link with the other mode of cross-border judicial interaction, i.e. referencing foreign judgments. While the use of foreign law presupposes knowledge of the work done by courts in other jurisdictions – something that membership of a transnational judicial alliance can facilitate – a number of factors may militate against incorporating foreign decisions in judicial opinions. The judicial custom[42] or legal system may not be such as to endorse this practice[43] or the foreign ruling offers a "negative" learning experience, for instance by drawing attention to relevant arguments or characteristics that are different or absent in the home environment. While the AACC's objectives include – besides promoting core tenets of constitutionalism – stimulating "the cooperation and exchanges of experiences and information among members",[44] there is no indication of, let alone active steering towards, a particular end-goal like more cross-citation of

[39] AACC St., preamble.

[40] Jackson, *supra* note 6, p. 86 goes even further and suggests that national constitutional provisions that insist that limitations of human rights must be necessary in a free and democratic society' "virtually require some comparison with other free and democratic countries." Among the AACC members, a clause along those lines can for instance be found in the Turkish constitution, art. 13 (restrictions must "not be in conflict with … the requirements of the democratic order of the society") and the Indonesian constitution, art. 28I(5) and 28J(2) ("in accordance with the principle of a democratic and law-based state"). Other constitutions proclaim that they adhere to universally recognised principles of international law (e.g. Philippines constitution, art. II(2); Mongolian constitution, art. 10(1)) and should, in the same vein, thus also be taken as mandating the consideration of legal sources external to the domestic order in constitutional litigation, with a concomitant need for the courts to explore avenues to obtain relevant foreign materials.

[41] This is a popular argument to justify the consideration of foreign law among scholars and academics alike. See e.g. Barak (2002), p. 111; Canivet (2010), p. 29-30; Slaughter (2000), p. 1103-5; Bryde, *supra* note 8; Kirby (2008), p. 186; La Forest (1994), p. 217; L'Heureux-Dubé (1998), p. 26-7.

[42] Note the potential relevance of judicial appointments in this regard: new appointments to the bench may come from a variety of professional groups – the bar, academia, politics to name a few – and have been socialised to consider different interpretative techniques as appropriate in adjudication.

[43] For instance, the propriety of citing foreign judgments in domestic constitutional litigation is most famously ferociously debated by scholars, politicians and judges in the US. For an introduction, see e.g. Posner (2008) 347-68; Rosenfeld (2012).

[44] AACC St., art. 3(e).

case law. This is surely correct as a different approach would raise serious questions as to the Association's legitimacy to do so, could jeopardise the readiness of other courts to apply for membership and would be difficult to reconcile with respect for the independence and discretion of its members.[45] As a matter of fact, another aspect pertaining to the "development" of Asian courts with constitutional jurisdiction that the AACC – like other transnational judicial alliances[46] – is eager to advance relates to the attributes that such courts should possess. A core concern is for the independence of the participating courts.[47] By sharing information and exchanging views, courts can obtain more clarity as to the types of challenges to judicial independence – ranging from attempts at political direction, media criticism, the power wielded by large corporations or tinkering with the resources earmarked for the delivery of constitutional justice – and what they may be able to do to maintain their independence.[48] Even more practical is a concern with improving the courts' operational framework, with the AACC having committed itself to facilitate the sharing of working methods and other procedural issues, for instance pertaining to the use of information technology.[49]

Finally, some courts decide to partake in transnational judicial alliances for strategic reasons that are geared towards cultivating their authority within such epistemic communities.[50] Under this view, courts see themselves as suppliers of successful approaches to achieving constitutionalism and consider associations such as the AACC as providing a convenient marketing platform to disseminate their ideas. In contrast to the first two reasons, membership is accordingly not valued for the contribution it can make to the delivery of constitutional justice in the court's own legal system, which is in fact considered satisfactory to such a degree that foreign courts may wish to consider emulation. Other judges are the target audience: the aim is cultivate the court's reputation and authority among its peers, not maintain or

[45] The AACC Statute's preamble underscores the importance of the latter consideration, by providing that the Association is established "with due regard to the principle of judicial independence".
[46] See e.g. Conference of Constitutional Jurisdictions of Africa Statute, preamble.
[47] AACC St., art. 3(d).
[48] This could of course also be a reason for some courts to refrain from participating in transnational judicial alliances: those that do not take too seriously their task of upholding the constitution, including by keeping the political branches of government in check might fear moral approbation from their foreign counterparts during meetings organised under the auspices of such alliances.
[49] AACC St., art. 4(d) and (e).
[50] This is akin to what Law, *supra* note 5, p. 10213 calls 'judicial diplomacy', although his description paints courts and judges who practice such diplomacy as more hard-nosed: "the diplomacy metaphor evokes a world in which competing courts jockey for influence and prestige …. an exercise in power politics".

improve the court's standing in the eyes of its domestic audiences. Courts and judges for whom this constitutes a powerful incentive tend to be among the more active members within judicial alliances. The exemplar of this rationale within the AACC is the Korean constitutional court. The Association's website touts this court's "leading role" in its creation[51] – a claim proudly repeated on the Korean court's own website[52] – and Seoul has been eager to host gatherings of constitutional justices. It organised the inaugural congress of the AACC, where Justice Min gave a speech in which he observed: "When we established our Constitutional Court, we did not have sufficient knowledge and experience. With the help of foreign countries' experience and wisdom, however, our constitutional adjudication system finally took firm root with great success. …. It is our mission and even an honour to provide support for such challenges [realising democracy and the rule of law in Asia] and efforts."[53] Implicit in this passage is a desire on the part of the Korean court to "pay it forward" and in so doing, establish itself as the natural benchmark of a successful constitutional judiciary in Asia[54] – akin to the position that the German *Bundesverfassungsgerichtshof* occupies vis-à-vis the younger constitutional courts in Central and Eastern Europe.[55] Besides seeking recognition for their judicial successes among foreign courts and advocating their way of dealing with legal issues, judges can act as torchbearers for the standing of their country and its legal system. This motivation also holds true for the Korean constitutional court: in an April 2015 news release it proclaimed that "By increasing its own international profile, the Court also played a role in strengthening the international presence of the Republic of Korea."[56]

It should be appreciated that the three rationales just discussed are not mutually exclusive. On the contrary, it will be common for courts to be influenced by a combination thereof, whereby the dominance of any particular incentive may also

[51] AACCEI.org (2012).
[52] English.ccourt.go.kr (2015a).
[53] Min, *supra* note 31, p. 9.
[54] In addition to participation in the multilateral AACC, the Korean court has also concluded several MOUs on bilateral cooperation: those with the constitutional courts of Thailand (2013) and Turkey (2009) seek to share knowledge and strengthen institutional capacities and comparative research; the 2015 MOU with the Mongolian constitutional court is geared towards assistance in the development of IT services, with the accompanying press release proudly noting how the Korean court's international profile in the field of constitutional justice has resulted in "an increasing number of courts … making requests for assistance with the development of their IT service and procedures in an effort to benchmark the Korean system even in the area of information technology", English.ccourt.go.kr (2015b).
[55] This can be aided by genealogical considerations: the Indonesian constitutional court was for instance consciously modelled after the Korean example.
[56] English.ccourt.go.kr (2015a), *supra* note 52.

change over time. Indeed, each of the reasons gives expression to the belief that participation in transnational judicial alliances is instrumentally useful for the performance of the court's constitutional mandate: either by making the court feel part of a wider community, with a keen sense of contributing to the realisation of intrinsically valuable principles and a strong *esprit de corps*; or enhancing the quality of its approach to constitutional adjudication for the benefit of its domestic interlocutors; or by better enabling it to try to export perceived national successes to attain international acclaim for itself and its State. These rationales are reflected in the overarching purpose that the AACC is expected to serve, namely to act as a conduit for knowledge and experience to advance constitutionalism in the region. The next section examines the means that it currently has available to do so.

II. The Transnational Judicial Alliance In Action

On the basis of its Statute, one can distinguish several forms of activity of the AACC. Its largest quantity of work is done in maintaining regular contact among member courts to enable the mutual exchanges of information and experience. The main vehicle in this regard is the organisation of biennial congresses open to its members, observers[57] and guests.[58] The inaugural congress took place in 2012, hosted by the Korean constitutional court, on the general topic of constitutional justice in Asia at present and in the future. The second congress was held in Turkey, during which themes ran the gamut from the protection of human rights to difficulties facing courts with a constitutional mandate to constitutional interpretation and the role of courts in protecting the constitutional order. The selection of the congress topic falls within the purview of the Board of Members, which is the AACC's principal decision-making body and comprises – as its nomenclature indicates – the presidents of the courts that enjoy full membership status.[59] In practice, the Board tends to accept the proposal made to this effect by the court hosting the upcoming congress.[60] This court also holds the rotating chairmanship of the AACC's, which runs from its designation as

[57] This status can be granted to domestic and supranational judicial bodies, AACC St., art. 9.
[58] Cf. AACC St., art. 10.
[59] AACC St., art. 13(c). Decisions are taken with a two-thirds majority vote and require a quorum of at least half of the AACC's members.
[60] This typically happens during the preparatory Board meeting, which is held after the most recent congress to prepare for the next such event

the organiser of the upcoming congress to this event actually having taken place.[61] Its president acts as the alliance's face to the outside world and takes care, with the help of his or her own support staff, of any administrative matters arising. Congresses are not open to the public, presumably to allow for an uninhibited sharing of views, although press releases with basic information regarding the proceedings are made available on the AACC's website. Besides allocating time for serious reflection and debate on constitutional topics, the conference program also typically features a series of social-cultural events the importance of which cannot be underestimated: they help members gain further appreciation for the environment in which one of their own performs its constitutional function and personal relations flourish more under the mellowing influence of wine and good cheer than during speeches in sterile hotel function rooms.

A further branch of the AACC's activities includes providing technical assistance to improve judicial independence, in recognition of the particular importance of this particular attribute for courts. In line with the UN Basic Principles on the Independence of the Judiciary[62] and other documents on this topic,[63] any such help is likely to address the procedure for selecting and appointing of constitutional judges, their remuneration, the tenure of judicial appointments and the termination thereof.

Lastly, the AACC can pursue cooperation with other organisations related to constitutional matters. These include associations of constitutional courts in other regions and it is common for representatives of such groupings to attend the biennial AACC congress. The AACC chair, for its part, reciprocates by participating in some of the events hosted by other networks of constitutional courts. This, one can surmise, allows for the sharing of best practices and mutual learning concerning the development of transnational judicial alliances and the direction that they may take. The importance of doing so should not be underestimated when we recall that – with the exception of the Conference of European Constitutional Courts – the setting up of regional judicial networks is a recent phenomenon and that there is accordingly no traditional blueprint that courts can follow. In addition, in 2012 the AACC concluded a cooperation agreement with the Venice Commission, which is the advisory body of

[61] AACC St., art. 14.
[62] 7th UN Congress on the prevention of crime and the treatment of offenders (1985).
[63] See e.g. OSCE Office for Democratic Institutions and Human Rights (2010); US Agency for International Development, Office of Democracy and Governance (2002).

the Council of Europe in the field of constitutional law.[64] The latter is increasingly active beyond Europe's shores and since 2002, non-European states are eligible to apply for membership.[65] South Korea has availed itself of this opportunity and joined the Venice Commission in 2006.[66] The impact of the relationship thus established for the AACC has been considerable. Eager to extend its role and operations from Central Asia[67] to other parts of the region, the Venice Commission advocated the creation of a regional forum for constitutional adjudicative institutions and liaised with the Korean constitutional court to launch the founding of the AACC; and it will be recalled that among the original members the latter played a leading role in this process.[68] The 2012 cooperation agreement was concluded when the Korean constitutional court was at the helm of the AACC as what should be appreciated as a further effort on the part of this court and the Venice Commission to strengthen ties for the benefit of the delivery of constitutional justice. The agreement gives AACC courts the option to contribute to the Commission's CODICES database, which holds full-text files on landmark constitutional rulings, with headnotes in English or French.[69] They are furthermore given access to the Venice Forum, a closed-off section for constitutional judiciaries on the Commission's website, which allows courts to enter into direct with one another and ask concrete questions, including for the purpose of adjudicating pending cases.[70] In addition, the agreement envisages the mutual exchange of

[64] Its official name is the European Commission for Democracy through Law. For a general description, see Dürr (2010).

[65] With a view to fostering cooperation among regional and linguistic judicial groupings, in 2009 the Venice Commission hosted the first World Conference on Constitutional Justice, with all but two of the AACC's members – the Turkish and Uzbek constitutional courts – in attendance. During this gathering, the participating courts called for work to commence on establishing the World Conference as a permanent body. This duly happened, with the statute for the World Conference entering into force on 24 September 2011.

[66] It was not the first AACC member to do so: Turkey was one of the 18 countries that founded this international body in 1990.

[67] Since the 2000s, the Venice Commission had been cooperating with authorities in some of the countries in Central Asia, inter alia through the "Central Asia Rule of Law initiative" under which Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan are assisted in refashioning their constitutional systems in line with the separation of powers and the rule of law and better safeguard judicial independence, notably including that of their constitutional courts.

[68] In 2014, the Venice Commission also allowed the Korean constitutional court to host the third congress of the World Conference of Constitutional Justice, which the latter saw as an opportunity to consolidate the role it sees for itself as a leader in the region, *supra*, note 54.

[69] "Co-operation Agreement between the Association of Asian Constitutional Courts and Equivalent Institutions and the European Commission for Democracy through Law of the Council of Europe (Venice Commission" (2012), Seoul, 22 May 2012.

[70] This Forum enjoys considerable popularity according to the Venice Commission's annual reports: in 2013, it received 32 questions on a wide range of constitutional topics; in 2012, 18 questions were asked on such issues as conscientious objection outside the context of military service; and in 2011, 30 requests for information that could assist in dealing with pending cases were made via the forum.

publications (such as studies or reports) and the right to participate in each other's meetings, notably the AACC congresses and the Venice Commission's Joint Council on Constitutional Justice.

The overview of the AACC's activities focuses attention on the extent to which it is successful in fostering respect for bedrock constitutional values in Asia and enhancing the performance of constitutional adjudicatory functions among its members. This is not a question that is possible to answer conclusively at this stage, because relevant quantitative and qualitative data are almost non-existent.[71] Even if they were more readily available, the number of variables at play is so large as to render the identification of any form of clear positive correlation between the activities of the AACC and the promotion of constitutionalism a decidedly challenging undertaking.[72] This article accordingly contends itself with observing that several participating judges have publicly praised the AACC for its contribution to advancing constitutional justice. Justice Hyeon-Ki Min of the Korean constitutional court spoke of the AACC as "growing into a prestigious and practical forum of institutions exercising jurisdiction on constitutional matters"[73] and Justice Kiliç, president of the Turkish constitutional court, has described the AACC as "one of the leading organisations in Asia in the field of constitutional justice" that has "filled a considerable gap".[74] One could argue that the justices had a vested interest in making these statements. Both were acting AACC chairs at the time and may have wanted to congratulate themselves and the other members for their sensibility in joining this alliance irrespective of the nature and extent of the advantages that participation has actually yielded, given the human propensity to avoid cognitive dissonance.

Indeed, when taking a closer look at the AACC's activities, one is left with the impression of an organisation whose accomplishments to date are rather modest when

[71] Such data could, amongst others, refer to the frequency with which citizens allege infringements of their rights or the rule of law, perceptions among societal groups as to the state of democracy in their jurisdiction, or the ease with which constitutional litigation can be initiated and the duration of proceedings.

[72] The influence of the AACC will manifest itself primarily, if not exclusively, in the judiciary's performance in upholding the constitution. However, responsibility for upholding and promoting constitutional values does not only reside in the judiciary, but is shared with other State institutions and non-state bodies. As such, to be able to make any authoritative statements on the empirical impact of the AACC and its activities in this regard, it would be necessary to pinpoint the specific judicial contribution to ensuring constitutional values within the relevant domestic setting.

[73] Min, *supra* note 31, p. 10.

[74] Kiliç (2014).

seen against its self-imposed ambitions. While its congresses undeniably contribute to relationship-building among AACC courts, there are limits to what these gatherings can achieve. In terms of timing, the congresses take place only every alternate year and are short in duration: members have effectively two days to meet, debate and socialize. Workload and financial resources presumably inhibit more frequent or longer congresses, but the current state of affairs clearly inhibits the extent and intensity of developing relationships among participants. This is arguably exacerbated by the set-up of the biennial congresses. The themes chosen for the exchanging of views have been broad and are pitched at a high level of generality; and the program does not allocate speaking time to every court in relation to each sub-theme to share its experiences, indicate the challenges that it has faced in dealing with a particular set of constitutional issues or highlight successful strategies that it has devised for this purpose. This *modus operandi* inhibits AACC congresses from contributing in as optimal a manner as possible to nurturing relations among participating courts and increasing familiarity with each other's work and working environment, even with due attention for the constraints mentioned earlier. As for the provision of technical assistance, there is no record of any member court having called on the AACC for support in enhancing one or more facets of its independence as of this writing – even though some have in fact been faced with threats to judicial independence: the Turkish constitutional court, for instance, has been subject to fierce criticism from the executive.[75] This leaves the AACC's involvement on the international plane. Focusing on its relationship with the Venice Commission, which offers the most concrete and sophisticated form of international collaboration, a mixed picture emerges. A handful of courts have been active contributors to the CODICES database and, as was to be expected, these all hail from countries that have acceded to the Venice Commission – Russia, Turkey and South Korea. While several others have made a more or less earnest effort to do the same,[76] almost half of the AACC institutions have never notified the Venice Commission of any decisions that they would like to see included in the database. This, it is suggested, is a missed

[75] See e.g. Buquicchio (2014); Magistrats Européens pour la Démocratie et les Libertés (MEDEL) (2014).

[76] While the database includes a respectable number of judgments handed down by the Indonesian and Kyrgystan, the track record of Mongolia, the Philippines and Tajikistan is bleak with five, two and one ruling respectively – the bulk of which predates the establishment of the AACC and the 2012 cooperation agreement with the Venice Commission.

opportunity to contribute to this collection of significant constitutional rulings and thereby raise the international profile of the court in question.

Notwithstanding the headway made by the AACC, there is thus good reason to consider how to improve its functioning so as to stand it in better stead to contribute the realisation of constitutionalism in Asia. That is the subject of the next section.

III. The Way Forward? Some Modest – And Some Bolder – Suggestions To Enhance The AACC's Potential

It is clear that courts with a constitutional mandate view the model of a transnational judicial alliance as a useful institutional arrangement for cross-border contact. In a related vein, the basic design of the AACC is surely satisfactory as it provides a convenient platform for more and easier engagements among interested Asian judges. Yet, some pragmatic adaptations are certainly sensible.

The case in favour of some modicum of change does not rest solely on the argument that doing so would better serve existing members, even though it is clearly important that any changes resonate with the self-interest of participating courts given that the AACC has no autonomous capacity to make decisions.

A second argument appeals to the AACC's aspiration to become a truly pan-Asian organisation. We have seen that a number of courts in the region that perform constitutional functions have until now refrained from joining the AACC. In the majority of cases, the decision not to apply for membership cannot be attributed to an attitude of indifference to forging relationships with foreign courts: there are judges in courts the world over that are enthusiastic about international networking in one way or another. Rather, the explanation appears to lie in either unfamiliarity with the AACC or the impression that it delivers only limited added value as compared to other modes of transnational contact. While disabusing non-member courts of such a belief is not something that the AACC can itself bring about, it is within its power to alleviate ignorance as to its existence and activities.

There is a further and more powerful argument to support proposals for change. The discourse on constitutionalism and the delivery of constitutional justice has gone global. This is manifested, amongst others, in the convergence of national constitutions in certain respects, most notably in the drafting and interpretation of

human rights provisions.[77] Also, and in addition to the creation of regional alliances of courts, institutionalised judicial networking has become a global phenomenon. At the instigation of the Venice Commission, the World Conference on Constitutional Justice was established in 2011 with the aim of facilitating a "judicial dialogue between constitutional judges on a global scale".[78] As of this writing, 96 courts have acceded to this organization, as have ten regional or language-based groups of constitutional judiciaries, the AACC included. Further, legal scholars and political scientists who research constitutional issues have broadened their vistas beyond the study of parochial questions and challenges: many prominent academics in this field write for an international audience,[79] employ a comparative methodology in their work or actively participate in international conferences.[80] This global discourse still bears the imprint of the Western experience with constitutionalism and constitutional justice, which may be attributed to two factors. First, the liberal democratic conception of constitutionalism practiced in the West is often treated as the best version of this ideal and the traditional paradigms of constitutional justice – the Kelsenian model of the separate constitutional court and the alternative of decentralised review – both originate from Western jurisdictions. Comparatively speaking, many states in the West can boast a long track record of liberal democratic rule and some form of constitutional adjudication, thus providing copious amounts of material for analysis. The second reason is that much of the primary and secondary materials on the Western approach are readily available and drawn up, or translated, in English, which is the *lingua franca* of the global discourse on constitutionalism. Yet, particularly in the last decade, there has been a growing interest in the

[77] See e.g. Peters (2007); Saunders (2014b); Tushnet (2009) (identifying a number of push-factors in this regard as well as inhibitors to constitutional convergence); Law (2008) (arguing that states may amend or draft their fundamental rights provisions so as to entice financial capital and human talent, resulting in a race to the top and presumably a more homogenous set of rights provisions); more critical see Dixon & Posner (2011).

[78] Venice.coe.int (2014). Venice.coe.int (2014) "3rd Congress of the World Conference on Constitutional Justice," http://www.venice.coe.int/WebForms/pages/?p=02_WCCJ (accessed 28 August 2015).

[79] This is facilitated by the establishment of international journals in this field by leading publishers such as the *International Journal of Constitutional Law*, launched in 2003 by Oxford University Press or *Global Constitutionalism: Human Rights, Democracy and the Rule of Law*, published by Cambridge University Press since 2014.

[80] See in particular the World Congresses and other events organised by the International Association of Constitutional Law (IACL), which aims to further the study of constitutional law and provide opportunities for contact to "those concerned with constitutional law and national or regional associations of constitutional law, thus developing among them mutual understanding and goodwill, as well as to enable and promote exchanges of views and of scholarly work", IACL Statute art. 4(1) and (2).

constitutional practice of non-Western states to complement and correct our understanding of the manner in which constitutional evergreens can be given effect. As a recent handbook observes, "[a]ttention to Asia helps remind us of the unspoken assumptions that sometimes lie in scholarship on comparative constitutional law, and thus of the value of more fine-grained, regionally focused forms of constitutional comparison.[81] The AACC could play a useful role as a conduit in compiling and disseminating materials about constitutional values and justice, thereby facilitating a concerted Asian contribution to the global constitutional discourse.

What, then, are the sorts of adjustments that AACC members may wish to consider to enhance their association's potential? Three proposals seem of particular current relevance.

A More Focused Approach During Biennial Congresses

The topic chosen for the inaugural AACC congress was broadly framed, befitting that particular occasion. As we have seen, a comparable approach was adopted for the second such event, during which the themes for debate were pitched at an equally, if not more, general level. This makes for a relatively unstructured discussion, whereby participants do not necessarily cover the same issues in their intervention. For example, a session devoted to "relations between constitutional/supreme courts and parliament" could invite comments on the role of the legislature in the selection and appointment procedure of constitutional justices, whether the scope of constitutional jurisdiction extends to an examination of parliament's rules of internal procedure or the frequency with which courts have found statutes not to pass constitutional muster and the mechanisms available to parliament to respond to judicial findings of unconstitutionality. When an intervention does not address a specific aspect of the general theme, the audience is left to wonder whether this is because that aspect does not play out in the country in question or because it is not perceived as problematic, and if so, why this is the case. Matters are exacerbated by the limited time available for the sharing of views – the average time allocated for discussion for each theme during the second congress was only one-and-a-half hours – and the fact that the program accordingly did not contemplate every member court taking the floor to

[81] Tushnet & Dixon (2014), p. 117.

address the gathering during each session. The current set-up, then, inhibits the sharing of experiences and mutual learning to the fullest extent.

It is suggested that in selecting the congress theme, AACC members ought to opt for depth over breadth. A more carefully delineated topic is conducive to a more focused discussion, by nudging participants to exchange views on relevant (legal-technical) particulars rather than delivering constitutional platitudes.[82] The AACC could further benefit from using questionnaires to collect and disseminate information about the constitutional praxis of its members. This methodology has been successfully employed by other judicial alliances, including the World Conference on Constitutional Justice that can count 11 of the current 14 AACC courts among its membership. In practical terms, either the court hosing the upcoming congress or the full board of members would draft a survey covering the various facets of the overall theme. Taking the constitutional evergreen of the nature and effect of judgments as an example, the questionnaire would invite participants to explain whether their judgments have *erga omnes* or only *inter partes* effects; whether they can hand down decisions of temporary constitutionality, holding that the contested legislation as yet comports with the constitution but will soon cease to do so; if partial invalidation of the impugned statute is possible and if so, under what conditions; do findings of unconstitutionality have effect *ex nunc* or *ex tunc*; whether they can defer the date on which annulment takes effect and if so, what considerations prompt it to make use of this power; whether they are able to decide that a law is incompatible with the constitution, while declining to declare it null and void; and whether the legislature can override judicial findings of unconstitutionality. Each AACC court would be expected to prepare a national report, setting out how these matters are regulated or dealt with in its jurisdiction, ideally illustrated with examples drawn from its body of case law. These national reports would then form the basis of the debate during the actual congress, thereby better enabling participants to identify and make sense of differences and similarities in approach. To further facilitate this process, the host court could be tasked with compiling a general report to be circulated among the AACC members in advance, that synthesises the national reports and pinpoints the most varied, contested or unsettled issues. Proceeding in this manner should make for

[82] It is further sensible to select a theme that resonates for all AACC members: this would for instance exclude impeachment jurisdiction or electoral disputes since not all courts are competent to adjudicate such matters.

a more interesting and constructive exchange of views during the necessarily limited time available for each congress.

Experimenting With Other Formats For Personal Meetings

Interactions in real-time are a particularly effective means to forge an epistemic community with a shared *Weltanschauung* and a common set of principled beliefs. AACC members ought accordingly to be encouraged to cultivate personal contact outside the context of the biennial conferences. Doing so would have the added benefit of providing more judges and other staff within each court with the opportunity to partake in face-to-face meetings and establish ties with foreign judges. Even though the impression is often created that transnational judicial engagements involve the judicial community at large,[83] it is typically the case that cross-border contact is still the preserve of only a small number of justices. These tend to be senior members of the court: official working visits are usually attended by the court's president, perhaps accompanied by one or a couple of other judges. The programs for other events – such as academic conferences – usually feature the same judges, and they happen to be those that already have a personal interest in cross-border interactions. The personal ties established and maintained through such meetings do not necessarily translate into strong inter-institutional connections or convince the rest of the bench of the merits of doing the same. Relationships that have initially flourished may thus quite abruptly dwindle when the travelling justices step down – an eventuality that is more common among separate constitutional courts than other courts since its members can hold office for a fixed period of time rather than for life.[84]

The AACC has taken some tentative steps towards a wider plethora of personal meetings. In the autumn of 2013, the Turkish constitutional court hosted a one-week summer school in which members of several AACC courts engaged in a

[83] Some have even spoken of transnational communication as "part of the judicial function", so Rosas (2007), p. 16.

[84] This is the case for the majority of AACC courts: judges of the Indonesian and Uzbek constitutional court hold office for a term of 5 years (Uzbek Constitution, art. 107); their counterparts in the Korean, Kazakh and Mongolian constitutional courts are appointed for a 6-year term (Korean Constitution, art. 112(1); Kazakhstan Constitution, Art. 71(1); Mongolia Constitution, art. 65(1)); in Tajikistan the duration of tenure of 10 years (Tajikistan Constitution, art. 84); Turkish constitutional judges serve for 12 years (art. 147) and in Azerbaijan appointments to the constitutional court are for a term of 15 years (Law on the Constitutional Court, art. 14(1).

dialogue on the theme of equality and non-discrimination.[85] There has further been an increase in the frequency of judicial delegations from one AACC court to another. These efforts are to be welcomed and notably the former should be encouraged for its potential to provide participants with a pluralistic set of approaches to tackle common challenges. It is therefore unfortunate that this 2013 summer school has been an *ad hoc* event rather than, as initially anticipated, the first such event in a regular series.

There is, furthermore, another practice that could usefully be introduced in the short to medium term: the setting up of an exchange program. For a period of at least one week, possibly extending to a full month, judges or their clerks would 'intern' at another AACC court, participating to the fullest extent possible in the professional and social life of the host institution. Such an immersion in the legal culture of another jurisdiction would enable judges to appreciate the working methods of their foreign counterparts in a way that cannot be replicated through seminars or bilateral visits, and would therefore be a particularly suitable means for the AACC to achieve its objective of promoting the exchange of information on the operation of constitutional justice.

To be sure, the implementation of an exchange program is not without difficulties. Considerable investments are associated with such a policy, which includes, importantly, time away from the bench and the need to ensure that exchanges do not give rise to or exacerbate a case backlog. Also, so as not to jeopardise the receiving court's independence as perceived by its domestic audiences, the foreign judges or clerks ought not to be present during judicial deliberations. It is submitted that these issues can be accommodated through a combination of strategic planning – for instance to avoid scheduling exchanges immediately before or after a court recess – and changes to the participating courts' internal working environment, including their office culture. Indeed, there are precedents for transnational judicial exchanges. For instance, the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union regularly organises two-week working visits during which selected judges spent a period of two weeks 'in residence' with a foreign court.[86] Reports from the participants show that they value such exchanges for a variety of reasons, with one judge stating that "[c]omparing the

[85] AACCEI.org (2014).
[86] For more details, see ACA-Europe.eu (2012). In addition, there is the European Judicial Training Network, which is set up as a non-profit organisation under Belgian law, and coordinates judicial exchanges for judges and prosecutors across the 28 countries that are members of the EU.

competences, procedure, organisation and working methods … enables one to reflect on the manner in which his own institution functions and see, concretely, how one can make improvements, not just structurally but also as regards the performance of one's own job"[87] and another expressing the view that "this type of exchange is an excellent way to come to a better unterstanding [sic] of the legal culture and the judicial systems of our European partners and to build up by personal contacts a judicial network [sic]".[88] These arguments should also resonate for the AACC, as the considerable diversity of its members could be a rich asset of this alliance, but requires conscious investment in breeding familiarity and understanding of each other's systems and approaches.

Increasing The AACC's Visibility And The Building Of An Asian Canon Of Constitutional Case Law

A visitor to the AACC's website may be forgiven for thinking that the alliance today leads a largely dormant life. As compared to the webpages maintained by several other cross-border judicial alliances, that of the AACC is mediocre at best in terms of the quantity of material available. Leaving aside a rather succinct overview of its origins and institutional set-up, one can there find the Statute; the biennial congress programs and declarations adopted at the close of these events; the speeches delivered during the inaugural congress and a handful of press releases. What is more, the great majority of materials date from 2012 and pertain to the AACC's launching event held that year: there are no formal documents bearing a later imprint and only a solitary announcement from May 2014. This, clearly, does not paint the image of a dynamic transnational judicial alliance.

The present condition of the AACC's website can be attributed to the decision to entrust the court hosting the upcoming biennial congress with responsibility for maintaining this portal: whether and what information is publicized is thus made dependent on the particular member court. For reasons explained earlier, the Korean constitutional court has been principally committed to making the AACC a success and it is hence not surprising that the bulk of the materials on the website was posted when this court was at the alliance's helm. The two subsequent chairs – the Turkish

[87] Michiels (2011), p. 15-16.
[88] Liebner (2012), p. 11.

and Indonesian constitutional courts respectively – have shown themselves comparatively less invested in maintaining this standard of development. The poor quality of the AACC's webpage, it is submitted, is in serious need of remedial action for both pragmatic and normative reasons. To start with, it is the principal medium for the AACC to make itself and its activities known to external audiences, such as other Asian courts that perform constitutional adjudicatory functions, non-Asian judicial institutions with a similar mandate and other groups with an interest in the performance of constitutional justice, like the scholarly community. The alliance should be cognizant of two important functions that its website may fulfil in this regard and gear its design towards the realization of these aims. On the one hand, it is an easily accessible and hence potentially very effective public relations tool. Put differently, if the AACC is serious about its aspirations to become a truly Asian organization and entice other judicial bodies to join, it should polish its electronic calling card. On the other hand, for the AACC to be an effective channel for Asian courts with a constitutional mandate to make their voice heard on the global stage presupposes a ready availability and accessibility of information about its own activities and those of its members. Furthermore, while Asian and other courts with constitutional responsibilities are rightly concerned about safeguarding their independence, they must also be subject to proper judicial accountability. When judges engage and debate with their foreign counterparts through transnational judicial alliances like the AACC, they open their minds to foreign influences, even if we accept that this exposure to foreign elements does not always or necessarily shape their behaviour in delivering constitutional justice in an appreciable manner.[89] Courts' audiences ought to be able to take cognizance of this fact. More generally, a plea in favour of more transparency is in keeping with the very constitutional values, notably the rule of law, that the AACC seeks to promote and strengthen through the cultivation of cross-border relationships.

It is accordingly suggested that the range of materials available on the AACC website ought to be expanded in a twofold manner. There should, firstly, be more information about the activities of the judicial alliance itself. This refers notably to the biennial congresses and if the proposal to reorient these flagship events developed

[89] But see Frischman (2016) who argues that institutionalised judicial networking will bring about a convergence in certain court practices and cautions that this may result in a possible disconnect from the court's domestic interlocutors.

earlier in this section is implemented, this would mean the online publication of the questionnaire, various national reports and general synthesis thereof. On the assumption that the themes for upcoming congresses will include topics with a clear institutional or procedural slant – such as the problem of legislative omissions or the relationship with other national courts – the AACC would thus offer valuable insights into the design of constitutional adjudication within Asia and instances of regional variation on the mainstream constitutional models.[90] Similarly, mention should be made of other personal gatherings that take place, with – at a minimum – a short account of the aim, participants and agenda. In a somewhat embarrassing twist, announcements of AACC board meetings are published by the Venice Commission in the 'recent and current events' page of its website, while the same information cannot be found on the alliance's own website.

Secondly, the efforts undertaken by the AACC members in giving effect to the rule of law, human rights and democracy in their respective jurisdictions should be featured more extensively. In this regard, the development of a database which holds files on (landmark) constitutional rulings merits serious consideration. Emulating the approach adopted by other regional alliances,[91] each file would contain basic information regarding the case (such as the names of the parties, applicable legal provisions, and relevant doctrinal works) as well as an analysis clarifying the aim and significance of the ruling, supplemented by English-language summaries or translations of the full text of judgments when these exist. This proposal is ambitious; some might even object that it is too radical and simply unfeasible. There is, however, good reason to insist on such an addition to the AACC website. Saunders has noted that all the courts in the region for which data is readily available "use foreign legal experience as an aid … in resolving constitutional questions brought before them" and do so with such a consistency as to "distinguish Asia, at least for the moment, from patterns across the world as a whole."[92] In a related vein, it has been suggested that the region offers an exciting and underexplored terrain for comparative constitutional studies, including in relation to the "rich Asian constitutional jurisprudence on civil and political rights, as well as socio-economic rights" which "sheds light on the varying conceptions of rights beyond Dworkinian trumps, and how

[90] For instance competing conceptions of the rule of law, on which see the country reports in Peerenboom (2004a); or alternatives to strong constitutional review, on which see e.g. Yap (2015).
[91] See e.g. ACA-Europe.eu (2015); Network-presidents.eu (2015).
[92] Saunders, *supra* note 8, p. 85.

these interact with ideas of duties, competing rights and public goods, in liberal and non-liberal settings." [93] There is, then, a clear demand for more data on the performance of Asian constitutional courts and their role in developing human rights, democracy and the rule of law. It is further submitted that the digitisation and free distribution of such materials by the AACC is within the realm of possibilities. Concretely, the AACC should liaise with the Venice Commission pursuant to the 2012 cooperation agreement and tap into the latter's experience in operating its CODICES database, as regards the information technology aspect as well as the drafting of the guidelines and categories to be used in structuring the presentation and ordering of constitutional judgments. The fact that several AACC member courts have contributed to the CODICES online catalogue means that they can be taken to have the linguistic capacity and willingness to do the same within the AACC setting. It also means that the AACC need not start *ex nihilo*: the collection of headnotes and decisions by a number of its member courts presently included in CODICES offers a solid basis for the development of its own databank.[94] More generally, there is a noticeable trend among courts in non-English speaking countries to have an English-language version of their website, where one can increasingly find a selection of constitutional case law. There is no reason not to replicate these documents in the AACC portal; in fact, the existence of a regional databank might even incentivise courts to (begin to) translate and share more of their judgments, notably when they regard the transnational alliance as a expedient medium to cultivate their reputation and that of their constitutional system among one another and to interlocutors outside the region.[95] One way to keep the expenditure attendant on this practice within reasonable limits is to follow several Central and Eastern European constitutional courts in entrusting law clerks with the task of translating headnotes or rulings. Their time is not as precious as that of the justices and by considering linguistic ability as one of the factors in the hiring process, the court can ensure that a sufficient

[93] Chang, Thio, Tan & Yeh (2014), p. 6. During the 1990s, several Asian politicians put forward the claim that human rights were conceived and implemented differently in their societies than in Western democracies, calling into question the universality of a number of fundamental rights. On this so-called Asian values debate, see e.g. Bruun & Jacobsen (2000); Davis (1998); Sen (1997); Bell (2000); Peerenboom, Randall (2004b); Chen (2010).

[94] One issue that the AACC would need to consider is whether it would be advisable to establish a permanent secretariat to maintain the website and case law portal, cf. the Statute of the Conference of Constitutional Jurisdictions of Africa, art. 28(n).

[95] From a scholarly perspective, the choice as to which decisions will be translated would also provide an interesting insight into the court's self-perception of its performance as a constitutional guardian.

proportion of its clerks would be competent to discharge such a responsibility.[96] Over time, the AACC website could thus become an English-language repository of an Asian canon of constitutional case law.

IV. Conclusion

The Association of Asian Constitutional Courts and Equivalent Institutions exemplifies the contemporary phenomenon of judicial networking in the Asian region. The analysis in this article provides support for the view that the AACC can have a positive impact on the cultivation of an epistemic community among courts in the region with a constitutional mandate and contribute to a robust discourse on classic precepts of constitutionalism within Asia and beyond. Yet, as we consider ways to further improve its ability to do so, one must acknowledge the political dimension to the AACC's evolution. Talk of comity and camaraderie among like-minded professionals that appear to be quite naturally drawn to each other's company should not make us forget that judges are also national citizens and within a transnational setting, representatives of their State. They will be conscious of regional geopolitical dynamics and this may very well influence the rigour with which the criteria for membership are applied to prospective candidates and how the club's outer contours will therefore be drawn. When interacting with one another under the auspices of the AACC, judges may also progressively seek to assert intellectual leadership: their interests shifting from debating the foundations for constitutionalism and constitutional justice to thrive at home and in the region to advocating particular approaches in the process of constitutional adjudication. This tendency is today most prevalent within the Korean constitutional court, which has exerted considerable influence over the AACC in its formative years. As other member courts too come of age, or as the alliance expands with other judicial institutions from legal systems with a robust tradition of constitutional review, the current relational equilibrium will change and so too might the outlook of the AACC.

A comparative perspective highlights a further variable that plays an important role in determining the pace of the AACC's development: the existence of other regional organisations that are similarly committed to advancing the rule of law,

[96] Each such translation would probably have to come with a disclaimer that it is an unofficial document and cannot be taken as the authoritative expression of the opinion of the court in question.

democracy and human rights. Transnational judicial alliances can gain traction by establishing ties with such entities and being co-opted in the implementation of concrete initiatives to inculcate those constitutional values among societal groups. For instance, the Conference of Constitutional Jurisdictions of Africa (CCJA) concluded a cooperation agreement with the African Union earlier this year.[97] Under this agreement, the CCJA will be able to communicate its views on constitutional matters directly to the Commission of the African Union through regular consultations; it will also enjoy observer status with that organisation. Besides being able to provide input in policy-making, the agreement further gives responsibility to the CCJA for designing and delivering joint programs "aiming at promoting democracy, good governance, human and peoples' rights, constitutionalism, free and fair elections and rule of law in the African Union Member States".[98] Even in the absence of explicit partnerships, the mere presence of arrangements for regional integration creates significant common ground and thereby serves as a catalyst for strong inter-court relationships. This is evident with the Conference of European Constitutional Courts: the great majority of its members hail from countries that have acceded to the EU and these courts are accordingly united in having to deal with the impact of European law on national constitutional law and mutual influences between the two legal regimes. For example, during their latest congress, held in 2014, they debated how to transcribe European judgments into the logic of national constitutional doctrine and the backgrounder note identified "different nuances in the approach to the rule-of-law principle or different conceptions with a view to fundamental rights doctrine (third-party effects, organisational and protection duties, institutional guarantees, and others" as "areas of paradigmatic significance in this context".[99] In a related vein, regional frameworks for human rights monitoring like the European Court of Human Rights or the Inter-American Court of Human Rights are natural rallying points for cross-border judicial contact.[100] National courts that operate in an environment that does not include similar structures lack the same sense of urgency or obvious range of

[97] Memorandum of Understanding between the Commission of the African Union and the Conference of Constitutional Jurisdictions of Africa (2015) Concluded at Addis Ababa, 2 April 2015.
[98] *ibid*., art. 1.
[99] Conference of European Constitutional Courts (2014).
[100] The European Court of Human Rights (ECtHR) is conscious of this role: its president and other judges habitually attend the congresses organised by the Conference of European Constitutional Courts and it hosts annual seminars entitled "Dialogue between Judges" to mark the opening of the judicial year where its members and members of national highest courts discuss themes of common interest.

conversation starters that would otherwise fuel and guide regional judicial networking. This is the world that members of the AACC and prospective affiliates inhabit. The closest regional counterpart to the African Union and the EU is ASEAN, which has as one of its objectives "[t]o strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms",[101] and this has inter alia prompted the setting up of the ASEAN Intergovernmental Commission on Human Rights.[102] Its geographical coverage is however limited to only a portion of the greater Asian region, restricting the 'honeypot effect' that it could otherwise have had on transnational judicial networking, or the pertinence of any official liaison between ASEAN bodies and the AACC.[103] The situation is not static however, and AACC members are keenly aware of the importance of cooperation in the domain of human rights.[104] During the 2014 World Conference on Constitutional Justice, the Korean constitutional court mooted the idea of creating a pan-Asian human rights court, modelled on the example of similar structures in Europe, the Americas and Africa. This initiative was, unsurprisingly, warmly welcomed by the participants and the Asian courts in attendance were "encourage[d] to promote such discussions".[105] The AACC would offer a suitable platform to do so. Whether and when the region will indeed witness the establishment of an Asian Court of Human Rights remains to be seen, but it is clear that the ramifications of such a development will extend far beyond the dynamics of a regional judicial alliance.

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[101] ASEAN Charter, art. 1(7).
[102] As required under ASEAN Charter, art. 14. The AICHR's mandate and functions are fleshed out in ASEAN Foreign Ministers Meeting (2009). A thorough examination of the genesis and context in which this body operates is offered by Tan (2011).
[103] Note further that not all ASEAN member states are represented within the AACC.
[104] Cf. AACC (2014), para. 3.
[105] World Conference on Constitutional Justice (2014).

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